

March 16, 1995

DOCKET NO. P-999/CI-87-697

ORDER DENYING REQUEST FOR STAY

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm
Tom Burton
Joel Jacobs
Marshall Johnson
Dee Knaak

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of an Investigation into
IntraLATA Equal Access and Presubscription

ISSUE DATE: March 16, 1995

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PROCEDURAL HISTORY

On July 21, 1994, the Commission issued its ORDER SETTING IMPLEMENTATION GUIDELINES FOR INTRALATA 1+ PRESUBSCRIPTION in the above-captioned matter. In that Order the Commission established a schedule for the implementation of intraLATA 1+ equal access and presubscription for Minnesota local exchange carriers (LECs) which do not currently provide the service. The Commission required LECs to provide intraLATA 1+ equal access within 18 months of receipt of a bona fide request (BFR) for the service from an interexchange carrier (IXC). The Commission also established January 1, 1997, as an ultimate date certain for implementation, unless the LEC receives a waiver from the Commission.

In the July 21, 1994, Order, the Commission also addressed a number of other issues associated with intraLATA equal access, including LEC recovery of implementation costs, LEC responses to requests for implementation, and balloting and allocation.

On November 3, 1994, the Commission issued its ORDER DENYING REQUESTS FOR RECONSIDERATION, DENYING REQUEST FOR STAY, AND GRANTING EXTENSION OF DEADLINE. In that Order the Commission denied requests for reconsideration filed by US WEST Communications, Inc. (US WEST) and AT&T Communications of the Midwest (AT&T). The Commission also denied a request by GTE Midwest, Inc. (GTE) to stay the effect of any BFRs received, pending issuance of the Commission final Order. Finally, the Commission granted the request of the Minnesota Independent Coalition for a time extension to its deadline for filing a waiver request in response to a BFR.

In August, 1994, MCI Telecommunications Corporation (MCI) and AT&T submitted BFRs to all Minnesota LECs not yet providing intraLATA 1+ equal access. The deadline for intraLATA implementation was thus established at approximately February, 1996, for all LECs not receiving a waiver from the Commission.

On December 2, 1994, US WEST filed an appeal of the Commission's decisions in the July 21, 1994, and November 3, 1994, Orders. US WEST claimed that the decisions in the Orders were in excess of the Commission's statutory authority or jurisdiction, and were issued in violation of lawful procedure and constitutional provisions. US WEST also claimed that the Orders were invalid under Minn. Stat. § 14.45, because they were adopted without compliance with statutory rulemaking procedures.

On December 5, 1994, GTE filed a similar appeal. The US WEST and GTE appeals are currently under consideration by the Minnesota Court of Appeals.

On December 2, 1994, US WEST filed with the Commission a motion to stay the Commission's July 21, 1994, and November 3, 1994, Orders, pending resolution of its appeal. On December 6, 1994, GTE joined US WEST's motion for a stay of the Orders.

On December 28, 1994, MCI and AT&T filed comments in opposition to the motions to stay.

On February 14, 1995, the matter came before the Commission for consideration.

FINDINGS AND CONCLUSIONS

I. THE MOTIONS TO STAY

US WEST and GTE cited Minn. Stat. § 14.65 for the Commission's authority to stay an Order pending appellate review.

Citing a 1987 Commission decision¹ in a matter concerning Northwestern Bell, US WEST and GTE stated that the Commission has previously determined the standard for granting a stay. According to the companies, the Commission in the Northwestern Bell decision relied upon a formula set forth in State v. Northern Pacific Ry. Co., 22 N.W.2d 569 (Minn. 1946). In the Northern Pacific case, the court found that a stay should be granted where it is necessary to protect the appellant from irreparable harm in case of a reversal and where important questions of law are raised, which, if decided in favor of appellant in error, would require a reversal.

US WEST and GTE stated that the facts before the Commission warrant the granting of a stay under the Northern Pacific factors. Irreparable harm would befall US WEST, GTE and many small LECs if they began making substantial investments in new equipment and software to meet the implementation deadline, and the decision was ultimately reversed. The companies would also be spending time and resources on the implementation of intraLATA presubscription which could be better put to use on projects which are ultimately viable.

¹ In the Matter of the Application of Northwestern Bell Tel. Co., Minneapolis, Minnesota, for Authority to Change Its Schedule of Telephone Rates for Customers within the State of Minnesota, Docket No. P-421/GR-83-600, ORDER GRANTING STAY AND ACCEPTING AGREEMENT TO REFUND (June 30, 1987), at page 2.

US WEST and GTE also argued that the appeal raises questions of law which, if decided in favor of the companies, would require reversal of the Commission Orders. The companies cited issues of notice, due process, and proper rulemaking procedure.

II. COMMISSION ACTION

A. Minn. Stat. § 14.65

The Commission agrees with US WEST and GTE that the Commission's authority to grant a stay pending resolution of a judicial appeal is found in Minn. Stat. § 14.65. That statute states in pertinent part:

The filing of the writ of certiorari shall not stay the enforcement of the agency decision; but the agency may do so, or the court of appeals may order a stay upon such terms as it deems proper.

B. Determining the Merits of the Requests for Stay

Minn. Stat. § 14.65 provides the Commission the discretion to grant or deny the request for stay. No other statute or rule limits or guides the Commission's decision-making process in stay proceedings. When faced with requests for stays in the past, the Commission has found useful guidance in similar judicial proceedings. The Commission has looked at the factors in the Northern Pacific case and at the factors applied by the Court in injunction proceedings in such cases as Dahlberg Bros. v. Ford Motor Co., 272 Minn. 364, 137 N.W.2d 314 (1965). While the Commission continues to find these decisions instructive, they do not govern the Commission's discretion in answering requests for stays. In the end, the Commission must act in its quasi-judicial capacity as it determines if the status quo should be preserved, pending the outcome of the appeal.

Having drawn upon the guidelines offered in the aforementioned judicial proceedings, and having applied its own regulatory expertise and discretion, the Commission here finds that the requests for stay should be denied.

1. The Object of the Appeal Will Not Be Defeated if No Stay Is Granted.

US WEST and GTE are currently appealing the Commission's July 21, 1994, and November 3, 1994, Orders. The decision of the Court of Appeals should be issued by June, 1995, at the latest. If the Court of Appeals grants US WEST and GTE the relief they seek, the Court will reverse the Commission's decisions regarding the implementation of intraLATA 1+ presubscription.

If US WEST and GTE are granted stays by the Commission, the July 21 and November 3, 1994, Orders will not go into effect until the appeal is resolved.

Under the Orders as they stand, US WEST and GTE, as well as other Minnesota LECs, must implement intraLATA 1+ presubscription by February, 1996.

Given these timetables, denial of the stay would not prevent US WEST and GTE from achieving the object of their appeal, reversal of the implementation decisions. Implementation of intraLATA 1+ presubscription would not take place during the period the stay, if granted, would be in effect. If the Court of Appeals reversed the Commission's implementation decisions, the reversal would occur before implementation had occurred.

2. The Moving Parties Have Not Made a Showing of Irreparable Harm if the Stay

Is Not Granted.

US WEST claimed that it would be irreparably harmed if the stay were not granted and the Court of Appeals eventually ruled in its favor. US WEST stated that it will have to begin making investments in equipment and software now in order to meet the February, 1996, deadline. Also, implementation of intraLATA 1+ presubscription will divert time and resources from other valuable projects. According to US WEST, if its appeal is successful and presubscription is not implemented, the wasted resources will constitute irreparable harm.

GTE stated that it would have to begin investing in switching, software, and administrative procedures before the appeal is resolved. For this reason, GTE argued, denial of a stay would bring irreparable harm.

The Commission finds that the companies have failed to make a showing of irreparable harm from denial of a stay. Most of the actions the companies maintained they must make--meeting, planning, and shifting resources--are not onerous obligations. They are reasonable measures to prepare for February, 1996, implementation. The companies have not offered concrete evidence that major expenditures must be made during the approximately three months before the Court of Appeals decision.

If the Court of Appeals decision is rendered in June, 1995, there will still be approximately eight months until the implementation deadline. It is a reasonable assumption that software and equipment manufacturers would be willing to install the necessary switching and hardware during the eight month period. It is also reasonable to assume that US WEST and GTE can postpone many administrative expenses until after the Court of Appeals has rendered its decision. US WEST and GTE have not shown that such a schedule would be unworkable.

It is true that the companies have no guarantee of revenue recovery if they expend unnecessary resources because a stay is denied. It is also true that the companies will be perfectly free to present their case for revenue recovery if they incur losses due to regulatory requirements.

US WEST and GTE have not shown that they would be irreparably harmed if the requests for stay are denied.

3. Granting the Stay Would Result in Disproportionate Injury to Others.

In the July 21, 1994, Order, the Commission noted that implementation of intraLATA 1+ presubscription reflects the Commission's and the legislature's general policy of increasing customer choice through IXC service expansion. Order at p. 11.

In the November 3, 1994, Order, the Commission noted that its series of presubscription decisions from 1985 onward reflects the Commission findings that intraLATA 1+ equal access is necessary for true competition and is in the public interest. Order at p. 5.

The Commission has thus firmly found that intraLATA 1+ presubscription is in the public interest and must be implemented. These policy decisions have been developed over a nearly ten year period. In the July 21 and November 3, 1994, Orders, the Commission made the necessary decisions to implement the service smoothly and fairly. While the parties must wait for the appellate court's response to US WEST's and GTE's appeal, the Commission sees no justification for a possible further delay from a stay. An unjustified stay would harm the general public by delaying implementation of a service which is in the general public

interest.

4. There is Little Likelihood of Success of the Appeal.

The Commission sees little likelihood of US WEST's and GTE's prevailing on appeal. The companies are seeking to overturn Commission policy decisions which have been developed and articulated over a ten year period. As the Commission stated in the November 3, 1994, Order:

...US WEST's attempt to overturn the Commission's public interest findings is inappropriate at this stage of the intraLATA proceedings. US WEST was a major player throughout the 582 and 212 Docket proceedings. US WEST chose not to appeal the Commission's 582 and 212 final Orders, in which the Commission's basic public interest findings on the intraLATA toll market were reached. US WEST's present request for reconsideration of the public interest findings amounts to an untimely effort to reverse prior Commission decisions. Order at p. 5.

5. Granting the Stay Would Frustrate Public Policy.

For the reasons previously articulated in this Order, the Commission has found that an unjustified delay in implementation of intraLATA 1+ presubscription would frustrate public policy.

D. Conclusion

Acting in its quasi-judicial capacity, the Commission has applied its discretion to determine the merits of the requests for stay. The Commission finds that US WEST and GTE have not made a showing that the Commission's Orders should be stayed pending the resolution of the parties' appeal. The Commission will deny US WEST's and GTE's requests for stay.

ORDER

1. The Commission denies the requests for stay filed by US WEST and GTE.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)